Supreme Court, U.S.
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Nos. 02-1574 and 02-1624

IN THE

Supreme Court of the United States

THE UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL A. NEWDOW, *et al.*,

Respondents.

ELK GROVE UNIFIED SCHOOL DISTRICT and
DAVID W. GORDON, Superintendent, EGUSD,

Petitioners,

v.

MICHAEL A. NEWDOW,

Respondent.

ON PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MICHAEL A. NEWDOW

MICHAEL NEWDOW, *Pro Se*
Post Office Box 233345
Sacramento, CA 95823
(916) 392-7382

181538

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

(1) Whether the inclusion of the phrase "under God" in the Pledge of Allegiance to the United States Flag violates the Establishment Clause of the First Amendment.

(2) Whether a parent who shares the joint physical custody, but has been deprived of the legal custody, of his child has Article III standing to challenge the daily inculcation of disputed religious dogma when that inculcation is perpetrated by his child's public school teachers.

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I. IS THE ESTABLISHMENT CLAUSE VIOLATED?

As explained in his Petition for Certiorari, Newdow joins with the United States and the EGUSD in requesting that the Court accept this case for review. A grant of certiorari is appropriate because (a) there is a conflict among the circuits, and (b) this case involves a matter of national importance.

Newdow, of course, disagrees with these two defendants over what the proper outcome should be. He believes the text of the First Amendment is quite clear, and that "no law respecting an establishment of religion" means just that. The suggestion that this magnificent phrase was designed with an exemption in mind for laws concerning supreme beings is offensive to the very notion of religious freedom, and testimony to the need "to take alarm at the first experiment on our liberties."[1]

Especially disputed is the claim that there are "repeated opinions of this Court and of the individual Justices consistently explaining that the Pledge of Allegiance . . . do[es] not violate the Establishment Clause." Petition of the United States, at 14.[2] The reality is that there are no such opinions at all. On the contrary, when one looks at the principled dicta that concern the Establishment Clause, the exact opposite is true. For instance, in just one appendix to his Original Complaint, Newdow supplied

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1. Madison's Memorial and Remonstrance against Religious Assessments, (As provided in *Everson v. Board of Education*, 330 U.S. 1, 65 (1947)).

2. Citations to the Appendix refer to the Appendix provided by the United States of America in its Petition for Certiorari to this Court (Docket #02-1574).

two hundred separate dicta, any one of which — if applied to the words, "under God," in the Pledge — would mandate the invalidation of that phrase. Original Complaint, Appendix G. The only statements that in any way bolster the government's contention merely state that we have a Pledge that contains religious words, offering no valid justification at all for that circumstance.

Even the "best" dictum that can be found doesn't come close to the task. Justice Blackmun's brief mention that

> Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief.

Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 602-603 (1989), was obviously written in response to Justice Kennedy's appropriate realization that:

> it borders on sophistry to suggest that the "'reasonable'" atheist would not feel less than a "'full membe[r] of the political community'" every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.

Id., at 673 (Kennedy, J., dissenting). Having been in the minority five years earlier in *Lynch v. Donnelly*, 465 U.S. 668 (1984), Justice Blackmun obviously desired to maintain a plurality in *Allegheny* (which was a highly fractured "consensus" that consisted of five separate opinions, which, all told, evoked ten

different coalitions of justices). Certainly, his other dicta in *Allegheny*, such as:

> "[T]his Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine." 492 U.S. at 590;
>
> "The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" 492 U.S. at 593-594 (citation omitted);
>
> "[W]hen evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether 'the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.'" 492 U.S. at 597 (citation omitted);
>
> "[T]his kind of government affiliation with particular religious messages is precisely what the Establishment Clause precludes." 492 U.S. at 601 (n. 51);
>
> "[W]e have held [the Establishment Clause] to mean no official preference even for religion over nonreligion." 492 U.S. at 605;

> "[T]he bedrock Establishment Clause principle [is] that, regardless of history, government may not demonstrate a preference for a particular faith." 492 U.S. at 605;
>
> "[T]he Constitution mandates that the government remain secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on the basis of their religious faiths." 492 U.S. at 610;
>
> "[T]here is no orthodoxy on religious matters in the secular state." 492 U.S. at 611;
>
> "[T]he availability or unavailability of secular alternatives is an obvious factor to be considered in deciding whether the government's use of a religious symbol amounts to an endorsement of religious faith." 492 U.S. at 618 (n. 67); and
>
> "[G]overnment may not engage in a practice that has the effect of promoting or endorsing religious beliefs." 492 U.S. at 621

are hardly consistent with the idea that he would have upheld the constitutionality of the Pledge.

That he specifically noted that the previous considerations of the Motto and the Pledge were "in dicta" also suggests that he was unconvinced that either was constitutional. As Justice Scalia has pointed out, the Court maintains a "customary refusal to be bound by dicta." *U.S. Bancorp Mortg. Co. v. Bonner Mall Pshp.*, 513 U.S. 18, 24 (1994), and the use of the phrase "in dicta" seems — if anything — to be a marker for the author's

disputation of the given claim. For instance, after Chief Justice Rehnquist wrote that, "We stated, in dicta, that . . ." in *United States v. Felix*, 503 U.S. 378, 389 (1992), he ruled contrary to what the dicta implied. Justice Thomas, in just the past year, has twice done the same. *See Hope v. Pelzer*, 536 U.S. 730, 762 (2002) and *Miller-El v. Cockrell*, 537 U.S. 322, __, 123 S. Ct. 1029, 1050 (2003).

The truth of the matter is that this Court has produced a mountain of pronouncements which — without exception — reveal that the principles underlying the Establishment Clause are incompatible with the continued presence of the religious words, "under God," in the Pledge. Each of the current Supreme Court Justices — like all those who have spoken previously on the Religion Clauses — has clearly enunciated ideals that reveal the constitutional infirmity of the Act of 1954:

Chief Justice Rehnquist:

> [A]lthough the . . . statute as a whole would be enacted to serve a secular legislative purpose, the proviso would clearly serve only a religious purpose.[3]

Justice Stevens:

> The importance of that principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority. For whenever the State itself speaks on a religious subject, one of the questions that we must ask is "whether the

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3. *Thomas v. Review Board, Ind. Empl. Sec. Div.*, 450 U.S. 707, 726 (1981) (Rehnquist, J., dissenting).

> government intends to convey a message of endorsement or disapproval of religion."[4]

Justice O'Connor:

> [W]hen [government] acts it should do so without endorsing a particular religious belief or practice that all citizens do not share.[5]

Justice Scalia:

> Where we have tested for endorsement of religion, the subject of the test was either expression *by the government itself*, . . . or else government action alleged to *discriminate in favor* of private religious expression or activity.[6]

Justice Kennedy:

> The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.[7]

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4. *Wallace v. Jaffree*, 472 U.S. 38, 60-61 (1985) (citation and footnotes omitted).

5. *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

6. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 764 (1995) (emphases in original).

7. *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

Justice Souter:

> [C]ivil power must be exercised in a manner neutral to religion.[8]

Justice Thomas:

> [T]he question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action.[9]

Justice Ginsburg:

> If the aim of the Establishment Clause is genuinely to uncouple government from church, a State may not permit . . . a display of this character.[10]

Justice Breyer:

> [A]voiding religiously based social conflict — remains of great concern.[11]

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8. *Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687, 704 (1994).

9. *Mitchell v. Helms*, 530 U.S. 793, 809 (2000).

10. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 817 (1995) (Ginsburg, J., dissenting) (reference omitted).

11. *Zelman v. Simmons-Harris*, 536 U.S. 639, 723 (2002) (Breyer, J., dissenting).

The Court should grant certiorari in this case, and loudly, clearly, and unanimously, proclaim that in this land of religious liberty, the government will never take a position — one way or the other — regarding disputed religious dogma.

II. STANDING FOR NON-CUSTODIAL PARENTS

Newdow is a devoted parent who shares joint physical custody of his daughter. Although he has been deprived of the legal custody of this child,[12] his interests and rights in directing her education have not been abrogated to anywhere near a degree sufficient to deprive him of standing as a parent in this case.

All three judges on the Ninth Circuit panel noted that the custody order "establishes that Newdow retains rights with respect to his daughter's education and general welfare." App., at 94a. The panel also recognized that, in California, decisions regarding religious upbringing are particularly reserved to both parents. Thus, it found that "the state and federal government may not seek to indoctrinate the child with their religious views, particularly over the objection of *either* parent." *Id.*, at 95a (emphasis in original).

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12. It is not within the province of this Response to detail the circumstances that led to this loss of legal custody. Suffice it to say that Newdow — an incredibly outstanding parent — was accused of "child neglect" for letting his daughter (while he dutifully stood by at the entrance) use an airport women's room. It was his challenge to the "expert psychologist" who made this ludicrous and irresponsible claim — and the animosity that the challenge engendered — that resulted in this restriction of his fundamental constitutional right of parenthood. The matter is currently before the California Court of Appeal for the Third District (consolidated case Nos. C040840, C042384).

The important observation that:

> The pledge to a nation "under God," with its imprimatur of governmental sanction, provides the message to Newdow's young daughter not only that non-believers, or believers in non-Judeo-Christian religions, are outsiders, but more specifically that her *father's* beliefs are those of an outsider, and necessarily inferior to what she is exposed to in the classroom.

Id., at 95a (emphasis in original) was also cogently made by the Ninth Circuit. This direct harm to Newdow, himself, certainly gives rise to standing.

One other essential point is that Newdow has not only the right, but the obligation to protect his child from harm.[13] To require him to go to the Superior Court to obtain permission to do this is but a further unjustified intrusion upon his parenthood. Even accepting that the State may constitutionally forbid Newdow from naming his child in the litigation,[14] he certainly has the right to vindicate his own interest in safeguarding her welfare.

As the Ninth Circuit unanimously concluded, parents like Newdow — who are intimately involved in their child's upbringing and who share in the decision-making about their lives — have

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13. "[P]arents during a child's minority have the legal right **(and obligation)** to act on behalf of their child to protect their child's rights and interests." *American Academy of Pediatrics v. Lundgren*, 16 Cal. 4th 307, 335 [940 P.2d 797, 66 Cal. Rptr. 2d 210] (1997) (emphasis added).

14. This contention is also being challenged in the California Court of Appeal for the Third District (consolidated case Nos. C040840, C042384).

standing to protect those children against potential harms.[15] Newdow believes (as this Court has repeatedly made clear) that there is harm to children when public school teachers espouse religious dogma. In this case, the harm is especially acute because the dogma being espoused is of a kind he finds offensive. To Newdow, his child is being wronged, and to suggest that he suffers no "injury-in-fact" when harm comes to this person he places above all else in his life is simply incorrect.

One last point concerns the fact of the mother's different religious views. This, actually, increases the harm to Newdow in regard to this case. Newdow is perfectly willing — actually glad — to see his child exposed to differing religious views at home. However, the government is now weighing in upon that parental difference of opinion, thus altering the dynamics of the family's religious debate. That, by itself, is an injury-in-fact that gives Newdow standing.

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15. As an analogy, consider a hypothetical where a military base was polluting the environment with lead dust. If the mother believed the need for national defense outweighed the developmental health risks to their growing child, would Newdow be precluded from seeking redress in the courts? Is the government suggesting that having a child with a preventable neurological impairment is no longer an "injury-in-fact" because of some limitations it has placed upon the parent's legal rights?

CONCLUSION

The petition for a writ of certiorari should be granted, and the purity of the Establishment Clause upheld. Devoted parents who are deprived of their legal custody should not be further injured by losing the right to advocate for their children in order to protect them from harm. Because a harm to a child is a harm to a parent, certiorari should be denied on that issue.

Respectfully submitted,

MICHAEL NEWDOW, *Pro Se*
Post Office Box 233345
Sacramento, CA 95823
(916) 392-7382